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In the Supreme Court of the United States

OCTOBER TERM, 1956

LIEBERMAN-KOREN CORP., AND SYLVIA KAPNER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1077

LIEBERMAN-KOREN CORP., AND SYLVIA KAPNER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 2) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 18, 1957. A petition for rehearing was denied on May 13, 1957. The petition for a writ of certiorari was filed on June 11, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the testimony of employees concerning overtime work without overtime pay was sufficient to

establish violations of the Fair Labor Standards Act, even though the employees could not specify the exact hours of overtime in particular weeks.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060), as amended by the Fair Labor Standards Amendments of 1949 (63 Stat. 910), are:

Section 7 (a) (29 U. S. C. 207 (a)):

> (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 11 (c) (29 U. S. C. 211 (c)):

> (c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

Section 15 (a) (1), (2), and (5) (29 U. S. C. 215 (a) (1), (2), and (5)):

> (a) * * * it shall be unlawful for any person—
>
> (1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7 of this Act, * * *.
>
> (2) to violate any of the provisions of section 6 or section 7 of this Act, * * *.
>
> (5) to violate any of the provisions of section 11 (c) of this Act, * * *.

Section 16 (a) (29 U. S. C. 216 (a)):

> (a) Any person who willfully violates any of the provisions of section 15 of this Act shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

STATEMENT

Petitioners were convicted in the United States District Court for the Eastern District of New York upon three counts of an information charging violations of the Fair Labor Standards Act between March 1951 and December 1952 by (1) willfully failing to pay proper overtime wages; (2) keeping false records; and (3) shipment in interstate commerce of goods made by persons not properly paid

(R. 3–4).[1] The corporation was fined a total of $3,000, and the individual petitioner (who was secretary-treasurer of the corporation and its only office employee (Tr. 1, 8–19)) a total of $750 (R. 12–13). On appeal the convictions were unanimously affirmed.

The corporation was engaged in shipping scrap metal in interstate commerce (Tr. 14, 26–27, 242). Five witnesses testified for the government that, during the period covered by the information, they frequently worked more than forty hours per week but were paid in cash by the individual petitioner at the normal hourly rate for all time worked (Tr. 86, 89, 136, 140, 209, 210–211, 252, 257–258).

The witnesses could not give exact hours and dates. One testified that, although his regular hours were from eight to five Mondays to Fridays, he had sometimes worked as late as ten or eleven at night (Tr. 81–82). He worked some Saturdays in addition to his regular five days (Tr. 85, 122). Another testified that he worked every Saturday unless the weather was bad (Tr. 133–134) and some weeks he worked as much as 68 to 70 hours (Tr. 135). A third testified that he "never stopped at forty hours, unless it was bad weather" (Tr. 211). Still another testified that although the regular leaving time was five o'clock he often stayed until six or seven o'clock when there was a rush of peddlers (Tr. 255–256). This witness worked Saturdays about ten or twelve times (Tr. 256). Three witnesses testified that each separately had

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[1] "R" refers to the printed record filed by petitioner. "Tr." refers to the transcript at the trial which is being lodged with the Clerk.

asked the president of the corporation, Morris Lieberman, who died before trial (Tr. 2), to pay them time and a half for overtime, and that in each instance Lieberman had answered that he could not afford to pay any more (Tr. 141, 212, 259). Lieberman told one witness "a man wasn't worth more at one hour to him than he was at another one." (Tr. 259.)

The payroll records of the corporation purported to show that no employee had worked more than 40 hours in a week and that none of the government witnesses had worked on Saturday before September 1952. (Gov. Ex. 2, 3, 4; Tr. 22–24, 30–31, 49, 52, 68–69).[2] In November, 1950, shortly before the period covered by the information, an investigator of the Department of Labor had had a conference with the individual petitioner at which he had explained to her the time-and-a-half and record-keeping requirements of the Fair Labor Standards Act (Tr. 11–13).

In submitting the case to the jury, the judge charged that, to convict, it must find beyond a reasonable doubt that petitioners knowingly and willfully failed to pay time and a half for overtime beyond 40 hours (R. 61–62) and knowingly and willfully kept false records (R. 62). He charged on the presumption of innocence, reasonable doubt, and the nature of circumstantial evidence (R. 63–64), saying that "[s]uspicions, surmises and speculations should not enter into your deliberations" (R. 64). He also charged that the offense proscribed "is a course of

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[2] There was a strike in the fall of 1952 (Tr. 146) and the yard was unionized in December 1952 (Tr. 70).

conduct" and that the government "need not prove specific dates or hours worked by employees" (R. 61).

ARGUMENT

Petitioners argue that since the government evidence did not show, and the judge charged the jury that the government need not prove, the specific weeks or hours in which the employees worked overtime, the evidence was insufficient to support their convictions. There was, however, ample evidence which justified the jury in concluding that the employees had often worked overtime, that the petitioners were aware of that fact, and had deliberately falsified the books to conceal the true facts. This was ample to establish an offense under the Fair Labor Standards Act which, in its criminal aspects, punishes a course of conduct, rather than specific violations as to particular weeks. *United States* v. *Universal C. I. T. Corporation*, 344 U. S. 218, 224. While that decision did, as petitioners point out, deal with the proper method of pleading the offense, rather than with the sufficiency of proof, its holding that the whole course of action, rather than each weekly work unit, constitutes the crime also necessarily establishes the elements of the offense which must be proved.

Even with respect to a civil action for damages, where the amount of overtime must be more precisely proved to form a basis of computation, this Court has pointed out that the employer should not obtain a premium from his failure to keep proper records, thus being in a position to assert that the employee has not established the hours worked with

sufficient accuracy. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 687–688. The Court said that "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." And further, "[t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of § 11 (c) of the Act." In the present case, where the exact amount of the underpayment is of no significance so long as the underpayment and false recording were willfully done, it is manifest that all that is necessary is sufficient evidence to establish that there was a willful contravention of the Act. The evidence here did establish that fact beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. Lee Rankin,
Solicitor General.
Warren Olney III,
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Beatrice Rosenberg,
Attorney.

July 1957.

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